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No. 91-1901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENERAL ELECTRIC CAPITAL CORPORATION,
Petitioner,

v.

NORTH COUNTY JEEP & RENAULT, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Bankruptcy Code § 506(c) provides that a bankruptcy trustee or debtor in possession may recover from, or "surcharge", a secured creditor's collateral for the reasonable, necessary costs and expenses of preserving, or disposing of, such collateral to the extent of any benefit to the secured creditor. Did the Ninth Circuit err in extending standing to surcharge a secured creditor's collateral under 11 U.S.C. § 506(c) to third parties other than trustees and debtors in possession in contravention of the plain and unambiguous text of the statute and the statute's legislative history?

If the Court concludes that Section 506(c) standing is available to third parties, then the following additional question is presented for determination:

2. Did the Ninth Circuit err by failing to set forth the parameters for permitting third party standing under 11 U.S.C. § 506(c) upon which bankruptcy administrators and secured creditors can rely?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
I. GECC HAS SATISFIED THE SUPREME COURT RULE 10 REQUIREMENT FOR ITS PETITION FOR WRIT OF CERTIORARI TO BE GRANTED DUE TO THE IMPORTANCE OF THE ISSUE OF THIRD PARTY STANDING UNDER 11 U.S.C. § 506(c) TO THE ADMINISTRATION OF BANKRUPTCY LAWS AND DUE TO THE CASE BEING ONE OF FIRST IMPRESSION BEFORE THIS COURT	2
II. THIS CASE DOES NOT MERIT AN EXCEPTION TO THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION	3
III. THE BASES UPON WHICH THIRD PARTY STANDING UNDER 11 U.S.C. § 506(c) IS PERMITTED WITHIN THE FIRST, THIRD, FIFTH AND NINTH CIRCUITS ARE NEITHER CLEARLY DEFINED NOR SEVERELY LIMITED	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page

UNITED STATES SUPREME COURT

Mosser v. Darrow, 341 U.S. 267 (1951) 5
Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) 5
Patterson v. Shumate, —— U.S. ——, ——, 112 S. Ct. 2242, 60 U.S.L.W. 4550 (1992) 3, 4
Reading Company v. Brown, 391 U.S. 471 (1968) .. 2
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 4

CIRCUIT COURTS OF APPEALS

Delgado Oil Co., Inc. v. Torres, 785 F.2d 857 (10th Cir. 1986) 3
In re McKeesport Steel Castings, Co., 799 F.2d 91 (3rd Cir. 1986) 6
In re Palomar Truck Corporation, 951 F.2d 229 (9th Cir. 1991) 6
In re Parque Forestal, Inc., 949 F.2d 504 (1st Cir. 1991) 6
In re Pointer, 952 F.2d 82 (5th Cir. 1992) 3
Matter of Delta Towers, Ltd., 924 F.2d 74 (5th Cir. 1991) 6
Saline State Bank v. Mahloch, 834 F.2d 690 (8th Cir. 1987) 3

UNITED STATES STATUTES

11 U.S.C. § 327 3
11 U.S.C. § 363(b) 3
11 U.S.C. § 364 3
11 U.S.C. § 365 3
11 U.S.C. § 503(b) 6
11 U.S.C. § 506(c) 2, 5, 6, 7
11 U.S.C. § 544 3
11 U.S.C. § 545 3
11 U.S.C. § 547 3
11 U.S.C. § 548 3
11 U.S.C. § 549 3
11 U.S.C. § 550 3
11 U.S.C. § 1107 2

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PETITIONER'S REPLY BRIEF

General Electric Capital Corporation, ("GECC" or "Petitioner") respectfully replies to the Opposition to Petition for Writ of Certiorari ("Opposition") submitted by North County Jeep & Renault, Inc. ("Respondent").

I. GECC HAS SATISFIED THE SUPREME COURT RULE 10 REQUIREMENT FOR ITS PETITION FOR WRIT OF CERTIORARI TO BE GRANTED DUE TO THE IMPORTANCE OF THE ISSUE OF THIRD PARTY STANDING UNDER 11 U.S.C. § 506(c) TO THE ADMINISTRATION OF BANKRUPTCY LAWS AND DUE TO THE CASE BEING ONE OF FIRST IMPRESSION BEFORE THIS COURT

The issue presented for review by this Court is of significant importance to the administration of bankruptcy laws. Respondent concedes that the "Ninth Circuit decided a matter of importance" in the case at bar. Opposition at p. 5. The significance of the Ninth Circuit's decision is that its refusal to adhere to the "plain meaning" rule of statutory construction has eradicated the predictability established in the United States Bankruptcy Code. The Ninth Circuit's decision will spawn a multiplicity of lawsuits which will directly and significantly impact the administration of bankruptcy laws and the dockets of the bankruptcy court system. Hence, Petitioner has satisfied the Supreme Court Rule 10 requirement for a Writ of Certiorari to issue in accordance with *Reading Company v. Brown*, 391 U.S. 471 (1968).

The Ninth Circuit has violated the "plain meaning" rule of statutory construction by interpreting the clear, unambiguous text of 11 U.S.C. § 506(c), which specifically states that only "the trustee may,"[1] to also allow third party standing in surcharge actions. Such an interpretation is neither warranted by the text of the statute nor its legislative history. Permitting third party standing under 11 U.S.C. § 506(c) will potentially result in innumerable surcharge actions because it would behoove any administrative claimant to seek to surcharge the collateral of a secured creditor in order to elevate the status of its unsecured claim, which would share equally with other general administrative claims, to the status of a

[1] And by operation of 11 U.S.C. § 1107, "the debtor in possession may."

superpriority or secured claim, which may receive payment in full.

The Ninth Circuit's holding is at variance with the cases construing other provisions of the United States Bankruptcy Code stating "the trustee may" [2] as limiting standing to trustees, debtors in possession, and in severely restricted circumstances, to third parties who are granted derivative standing. Moreover, the Ninth Circuit's interpretation of the term "trustee" to mean "trustee or creditor" is also in tension with several Courts of Appeals decisions holding that the term "trustee", used elsewhere in the code, specifically excludes "creditors". *See, e.g., In re Pointer*, 952 F.2d 82, 87-88 (5th Cir. 1992) (section 549); *Saline State Bank v. Mahloch*, 834 F.2d 690, 694 (8th Cir. 1987) (section 544); *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986) (section 547). Finally, the Ninth Circuit's holding fails to observe this Court's mandate that the interpretation of a United States Bankruptcy Code section should "accord with the prevailing interpretations of [the words] as [they] appear elsewhere in the Code." *Patterson v. Shumate*, —— U.S. ——, 112 S.Ct. 2242, 2247, 60 U.S.L.W. 4550 (1992).

II. THIS CASE DOES NOT MERIT AN EXCEPTION TO THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION

The "plain meaning" rule of statutory construction dictates that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases' [in which] the

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[2] *See* e.g., 11 U.S.C. § 327—"the trustee may employ"; 11 U.S.C. § 363(b)—"the trustee . . . may use, sell or lease"; 11 U.S.C. § 364—"the trustee may obtain unsecured credit"; 11 U.S.C. § 365—"the trustee . . . may assume"; 11 U.S.C. § 544—"the trustee may avoid"; 11 U.S.C. § 545—"the trustee may avoid"; 11 U.S.C. § 547—"the trustee may avoid"; 11 U.S.C. § 548—"the trustee may avoid"; 11 U.S.C. § 549—". . . the trustee may avoid"; 11 U.S.C. § 550—". . . the trustee may recover."

literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (citation omitted). This Court has recently stated that where the text of a statute is clear, the party requesting a departure from the text bears an "exceptionally heavy" burden of persuading the Court that Congress intended otherwise. *Patterson v. Shumate*, —— U.S. ——, 112 S.Ct. 2242, 2248, 60 U.S.L.W. 4550 (1992), *citing Union Bank v. Wolas*, 502 U.S. ——, ——, 112 S. Ct. 527, 530, 116 L.Ed.2d 514 (1991). Respondent contends that this case is one of those "rare cases" that qualifies as an exception to the "plain meaning" rule of statutory construction. Respondent's contention is based upon two factors.

First, Respondent claims that in operating the Palomar Truck Corporation ("Palomar") automobile dealership, it was "acting as agent *for the trustee*." Opposition at p. 7. Respondent's assertion is totally unsupported by the facts of this case because (1) the Operating Agreement between Respondent and the trustee did not provide that Respondent was either acting as agent for the trustee or even discharging a duty of the trustee; (2) Respondent has never before in the record of this case claimed to have acted as the "trustee's agent"; and (3) Respondent and the trustee, as buyer and seller respectively, had adverse interests and the Operation Agreement merely provided that Respondent commenced operation of the Palomar automobile dealership prior to the terms of the sale being finalized, which is a typical provision in automobile dealership purchase agreements. Respondent now seeks to be recompensed by GECC for the loss it unfortunately sustained during its operation of the Palomar automobile dealership. Any amounts recovered will go straight into Respondent's pocket. That fact alone obviates any possibility that Respondent acted as an agent for, or discharged a duty of, the trustee, for a bankruptcy trustee must act for the benefit of the

estate, not to advance his own self-interests. *Mosser v. Darrow*, 341 U.S. 267, 271 (1951).

Second, Respondent claims that an exception to the "plain meaning" rule of statutory construction should be made where "failure to grant [a third party administrative claimant] standing [under 11 U.S.C. § 506(c)] would result in a windfall for the secured creditor at the expense of the unpaid claimant." Opposition at p. 7. No such exception to the "plain meaning" rule of statutory construction exists. Courts may not use equitable considerations to depart from the confines of the United States Bankruptcy Code and disregard unambiguous statutory language. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.)

Respondent has not met its "exceptionally heavy" burden of persuading this Court for a departure from the plain, unambiguous text of 11 U.S.C. § 506(c). Contrary to Respondent's contentions, it was not "acting as agent *for the trustee*." Moreover, there is no equitable exception within the confines of the United States Bankruptcy Code permitting a bankruptcy court to compensate for any alleged windfall to secured creditors as a result of adhering to the plain meaning of 11 U.S.C. § 506(c). Hence, third party standing under 11 U.S.C. § 506(c) should be denied.

III. THE BASES UPON WHICH THIRD PARTY STANDING UNDER 11 U.S.C. § 506(c) IS PERMITTED WITHIN THE FIRST, THIRD, FIFTH AND NINTH CIRCUITS ARE NEITHER CLEARLY DEFINED NOR SEVERELY LIMITED

Respondent contends that the bases upon which third party standing is permitted under 11 U.S.C. § 506(c) within the First, Third, Fifth and Ninth Circuits are both clearly defined and severely limited. Respondent alleges that in order for third parties to successfully assert stand-

ing in surcharge actions, the following criteria must be met: (1) the claimant must have an administrative claim under 11 U.S.C. § 503(b); (2) the trustee must have no incentive to seek recovery under 11 U.S.C. § 506(c); and (3) failure to pursue the claim must result in a windfall for the secured creditor at the expense of the unpaid claimant. Opposition at p.10.

A review of the bases upon which third party standing was granted under 11 U.S.C. § 506(c) in the decisions from the four circuit Courts of Appeals reveals that no such clearly defined or severely limited standard exists. The First and Third Circuits appear to be most closely aligned in that the parameters under which third party standing was permitted therein were: (1) where the claimant had a colorable claim for the expenses and was the only creditor that would zealously pursue that claim, and (2) where the trustee had no incentive to make a claim against the secured creditor. *In re Parque Forestal, Inc.*, 949 F.2d 504, 512 (1st Cir. 1991) and *In re McKeesport Steel Castings, Co.*, 799 F.2d 91, 94 (3rd Cir. 1986). However, in the Fifth Circuit the sole basis under which third party standing was granted was that the trustee or debtor in possession had refused to pursue the administrative claim. *Matter of Delta Towers, Ltd.*, 924 F.2d 74, 77 (5th Cir. 1991). Finally, in the case at bar, the Ninth Circuit seemed only interested in whether the trustee or debtor in possession had an economic incentive to pursue the 11 U.S.C. § 506(c) claim. *In re Palomar Truck Corporation*, 951 F.2d 229, 232 (9th Cir. 1991).

Hence, it is clearly evident from a review of the decisions of the four circuits that the bases upon which third party standing under 11 U.S.C. § 506(c) is permitted are neither clearly defined nor severely limited.

CONCLUSION

The questions presented for review by this Honorable Court introduce an issue of grave importance to the administration of bankruptcy laws in a case of first impression. The decision of the Ninth Circuit in the case at bar violates the "plain meaning" rule of statutory construction and was grounded in an equitable exception that simply does not exist within the confines of the United States Bankruptcy Code. Plainly read, the text of the statute dictates that standing under § 506(c) of the Bankruptcy Code, Title 11 of the United States Code, is limited to trustees and debtors in possession.

Respectfully submitted,

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